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No. 83-1362

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JAMES LOUDERMILL,
Cross-Petitioner

- vs -

THE CLEVELAND BOARD OF EDUCATION, et al.
Cross-Respondent

CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

- I. Is a discharged civil service employee, who has a property interest in his employment, and who was denied any pretermination procedures, denied due process of law as guaranteed by the Fourteenth Amendment when a nine (9) month period expired between the time of his termination and a decision of his posttermination administrative appeal?
- II. Is a discharged civil servant's Fourteenth Amendment's liberty interest violated when unproven and unjustified references alleging dishonesty are disseminated among potential employers during the nine (9) months elapsing between his termination and the decision of his posttermination administrative appeal, which foreclosed and stifled his opportunity for other employment?

PARTIES

See page II of the original Petition For Certiorari.

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CROSS-PETITION FOR WRIT OF CERTIORARI
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FOR THE SIXTH CIRCUIT

James Loudermill cross-petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review part of the judgment entered by that court against him.

OPINIONS BELOW

See page 1 of the original Petition For Certiorari. The opinion of the Court of Appeals is reported at 721 F. 2d 550.

JURISDICTION

This cross-petition seeks review of a decision of the United States Court of Appeals for the Sixth Circuit entered on November 17, 1983.

The Petition For Certiorari was received by counsel for the Cross-Petitioner on February 20, 1984, and the present cross-petition was filed within thirty (30) days of that date pursuant to Rule 19.5 of this Court.

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL ISSUES INVOLVED

See page 2 of the original Petition For Certiorari.

STATEMENT OF THE CASE

See pages 4 and 5 of the original Petition For Certiorari.

This cross-petition asks this Court to review the Court of Appeals' judgment affirming the District Court's order dismissing Cross-Petitioner's claims of excessive delay in the post-termination hearing and a denial of a liberty interest.

FACTS

Cross-Respondent's (Petitioner's) statement of the Facts leaves holes of lacking information that this Cross-Petitioner (Respondent) feels compelled to fill.

After his termination, the Cross-Petitioner did have a full evidentiary hearing before a Referee of the Cleveland Civil Service Commission. As an outcome of that hearing, the Referee made a report recommending that the Cross-Petitioner be reinstated. Specifically contained in the report was a finding that Respondent had honestly made a mistake concerning his conviction of a crime.

The Cross-Respondent objected to the Referee's report and perfected an appeal to the full Cleveland Civil Service Commission.

On July 20, 1981, oral argument only was presented to the Commission, and no new evidence was heard by them. Accordingly, the Commission had no independent factual basis for reversing the Referee's findings in their 3-2 decision which reversed the Referee and upheld his termination.

Instead of pursuing his state court appellate remedies, Cross-Petitioner sought relief in the federal court system by filing his Complaint on October 27, 1981. Therein, Cross-Petitioner sought certification as a class action, as well as injunctive and declaratory relief that Ohio Revised Code Sec. 124.34 was unconstitutional on its face and as applied, in that there was no provision for pretermination procedures, nor sufficient post-termination procedures required by the due process clause of the Fourteenth Amendment.

From the time of his summary termination on November 3, 1980 until August 10, 1981 (when the Commission filed its decision), nine months had elapsed.

The Cross-Petitioner failed to perfect an appeal of the decision of the Commission to the Court of Common Pleas of Cuyahoga County, Ohio, as his administrative appeal had lasted nine months, and he was financially unable to proceed through lengthy and expensive state court appeals.

He was not required to exhaust his state court remedies when the delay involved therein was part of his federal constitutional claims, Barry v. Barchi, 443 U.S. 55, 63, n. 10 (1979), and his termination, as claimed by the Cross-Respondent, was not valid and final.

ARGUMENT

Question I

Ohio Revised Code Sec. 124.34 (pages 2-4 of the original Petition) provides that an appeal from a termination order of a classified civil service employee shall be heard within thirty (30) days after the notice of an appeal is filed. However, the Ohio courts have held such a requirement to be directory and not mandatory. In re Bronkar, 53 Ohio Misc. 13, 17 (1978).

The Cross-Petitioner's appeal in the present case was not completed until nine (9) months after his notice of appeal was filed.

The Cross-Petitioner also requests this Court to take judicial notice that the issue of the unconstitutional delay in the disposition of post-termination appeals was accepted for review in the case of Davis v. Scherer, U.S. Supreme Court Case No. 83-490.

The length of a delay in an administrative proceeding is an important factor in determining whether the procedure complies with the procedural requirements of the Due Process Clause of the Fourteenth Amendment. Fusari v. Steinberg, 419 U.S. 375, 386 (1975). Administrative proceedings have been held to be unconstitutional because of excessive delays. Gibson v. Berryhill, 411 U.S. 564, 575, n. 14 (1973). The Respondent's interest in continued employment is a substantial one, Logan v. Zimmerman Brush Co., et al., 455 U.S. 426, 434 (1982); and once he was terminated, his interest in having his appeal heard promptly was substantial, Barry v. Barchi, *supra*. The Respondent had a right to have his appeal timely decided by the Commission, Gibson v. Berryhill, *supra*, p. 577, which right was denied him.

The Court of Appeals held that the Respondent could have filed a petition for a writ of mandamus in order to obtain an expedited review of his appeal. However, this Court has recently held that the ability of a party to protect his own interests does not alleviate the government's responsibility of providing individuals with basic due process requirements where deprivation of life, liberty or property are involved. Mennonite Board of Missions v. Adams, U.S., 103 S. Ct. 2706, 2712 (1983).

The plurality opinion in Arnett v. Kennedy, 416 U.S. 134, 158 (1975), held that a delay in processing an appeal of a termination of three (3) months was not excessive. However, the delay involved herein in processing the Cross-Petitioner's appeal was three times as long as the delays involved in Arnett v. Kennedy, *supra*.

This Court held in Mathews v. Eldridge, 424 U.S. 319, 341-342 (1976), that a ten to eleven month delay in affording post-termination hearings was not excessive. However, that case dealt with the termination of Social Security Disability benefits,

while the present case deals with a termination of wages, the receipt of which are an important part of our economic system. Sniadach v. Family Finance Corp., 395 U.S. 337, 340 (1969).

Also, the original determination in Mathews v. Eldridge, *supra*, was a medical one, which could easily be made by reading reports prepared by a physician, and were reliable. The termination of a public employee, who has a property interest in his continued employment, is based upon a consideration of fault.

Therefore, the credibility of witnesses is important, and the submission of written responses is not reliable. Califano v. Yamasaki, 442 U.S. 682, 697 (1979). The Respondent presented a good faith defense: He thought he had been convicted of a misdemeanor, and so, the present case can be distinguished from Mathews v. Eldridge, *supra*.

If irreparable injury may result from a deprivation of a protected property interest pending a final adjudication, due process requires that the party whose property is taken be given some opportunity for some kind of predeprivation or prompt post-deprivation hearing. Commissioner v. Shapiro, 424 U.S. 614, 629 (1979). Also, the deprivation of property can be accomplished only after an informal hearing; but then, the full evidentiary hearing must be held promptly thereafter. Barry v. Barchi, *supra*, p. 72 (Brennan, J., concurring); Goldberg v. Kelly, 397 U.S. 254, 269-270 (1970); and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607 (1975). A nine month delay in the determination of an appeal is not a prompt hearing.

Additionally, the fact that the delay in determining the Respondent's appeal herein may have been inadvertent does not prevent the excessive delay from being in contravention of the Due Process Clause. Parratt v. Taylor, 451 U.S. 527, 534 (1981).

Question II

The Court of Appeals held that the terminated public employee is not denied a liberty interest protected by the Due Process Clause if the reasons for his termination are not published. However, it is not the defamation that creates the constitutional protections, but the deprivation of a right or status previously recognized by state law. Paul v. Davis, 424 U.S. 693, 708-709 (1976). This Court stated in Roth v. Board of Regents, 408 U.S. 564, 573 (1972):

"...there is no suggestion that the State in declining to re-employ the respondent imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities."

A terminated public employee is denied a liberty interest if the reasons for his termination impair his reputation for honesty and morality. Vanelli v. Reynolds School District No. 7, 667 F. 2d 773, 777 (C.A.11, 1982). The court in Vanelli, *supra*,

held that the procedural protections of the Due Process Clause are required whenever the accuracy of the charges is contested, and there is some public disclosure, and the latter requirement was fulfilled when the employee was foreclosed from other employment opportunities because of the reasons for termination.

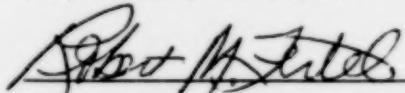
Under the common law of defamation, the requirements of publication are satisfied if the false allegations are communicated in any manner to another person. Since it is the alteration of a right or status protected by state law that is sufficient to invoke the procedural guarantees contained in the Due Process Clause, Paul v. Davis, supra, p. 708, the Respondent was denied a liberty interest when the reasons for his termination were communicated to other prospective employers, which foreclosed him from other employment opportunities.

CONCLUSION

The Cross-Petitioner was denied due process of law by a nine month delay in the decision of his post-termination administrative appeal, and he was also denied a protected liberty interest when he was terminated for alleged dishonesty and foreclosed from other employment opportunities by the dissemination of the reasons for his termination to potential employers.

The Cross-Petitioner has legitimate grievances and reasons of great public interest warranting this Court granting his Cross-Petition for a Writ of Certiorari.

Respectfully submitted,



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